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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1944**

**No. 391**

**RICHARD RICE,**

*Petitioner,*

*vs.*

**NEIL OLSON, WARDEN OF THE NEBRASKA STATE PENITENTI-  
ARY AT LANCASTER, LANCASTER COUNTY, NEBRASKA,**

*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NEBRASKA AND BRIEF IN  
SUPPORT THEREOF.**

(S.) **RICHARD RICE,**  
*in persona.*



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**PETITION FOR WRIT OF CERTIORARI TO THE  
SUPREME COURT OF NEBRASKA AND BRIEF IN  
SUPPORT THEREOF.**

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*To the Honorable Chief Justice and Associate Justices of  
the Supreme Court of the United States:*

Your petitioner, Richard Rice, respectfully prays for a Writ of Certiorari herein to review a certain final judgment of the Supreme Court of Nebraska, being the highest court of said State in which a decision could be had, the original opinion and decision of said court having been rendered on April 7, 1944 (R. 11-16), and a motion for rehearing having been filed within the time provided by the law of said State was, after being entertained and considered by said court, overruled without an opinion on June 9, 1944 (R. 16).

### Summary Statement of Matter Involved

I. In the case at bar, petitioner on August 11th, 1943, filed his petition for writ of habeas corpus in the District Court of Lancaster County, Nebraska, contending, alleging and showing the court that:

"His trial, conviction and commitment, entered by the District Court of Thurston County, Nebraska (which commitment he is now undergoing) deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in this, to-wit: . . . In the instant case the record bespeaks the truth, that your Petitioner was triad and convicted before a court of incompetent jurisdiction, in that he was deprived of his Constitutional right to due process of law in this to-wit:

(a) In that no jurisdiction rested in the trial court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an Indian Reservation Government property without and beyond the jurisdiction of the Trial Court. . . .

(b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel; empaneling of a trial jury. . . .

(c) In that the judgment of conviction is unconstitutional and void, in that the Trial Court imposed an indeterminate sentence rather than a flat or definite sentence as by law made and provided in that your petitioner had previously served a sentence in a penal institution of the State of Nebraska at the mens Reformatory at Hawthorne, Nebraska. . . .

And furthermore . . . Your Petitioner is an Indian of the Winnebago Tribe, located in the State of



Nebraska, Thurston County, Nebraska, but no part of the State of Nebraska, exclusive under the jurisdiction of the Federal Government all without and beyond the jurisdiction of the Trial Court. Your Petitioner is Thirty (30) years of age, after being confined in the Nebraska State Penitentiary for 18 months he was informed that his proper remedy to correct the aforesaid mentioned deprivation of his liberty by a court without jurisdiction so to do, he employed counsel who advised him that his proper remedy was to file a Writ of error coram nobis with the Trial Court, petitioners Sister paid said counsel a fee of Seventy-five (\$75.00) Dollars to prepare and file said petition for writ of error coram nobis in the Trial Court which petition was on October 5, 1942, dismissed for want of prosecution on the part of Counsel. Your petitioner is ignorant of the science of law, has never studied law, and has no one to champion his cause of action only the assistance of a fellow inmate. Under all these circumstances he is entitled to be released upon his petition. \* \* \* (R. 1-8).

A copy of the petition was duly served and filed in rule time joining the issues.

On the same day the petition was filed the court entertained the Federal contention raised and ordered the "application for a Writ of Habeas corpus is denied and petition is hereby dismissed. \* \* \*. No grounds is shown for the issuance of the writ prayed for. \* \* \* (R. 8).

In due time petitioner, presented to the court for consideration a motion for new trial on the grounds that the court erred in not holding that petitioners trial and conviction and commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that said Trial, Conviction and Commitment are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of



the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, the court entertained the Federal contention raised (R. 8-9), and overruled the motion in all things on August 26, 1943, without a hearing.

Petitioner timely presented, in the manner and form, provided by law, an appeal from the judgment aforesaid to the Supreme Court of Nebraska, which court April 7, 1944, after having considered said cause on briefs without argument, entered its judgment in all things affirming the judgment and order of the District Court denying and dismissing the petition for writ of habeas corpus ex parte, on the grounds that petitioner's plea of guilty stood as a jurisdictional bar to test the judgment of conviction entered by the District Court of Thurston County, Nebraska, entered in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States (R. 10-16). Thereafter, your petitioner within the time and in the manner required by law, filed his Motion for Rehearing and brief in support thereof in the Supreme Court of Nebraska, and such motion was in all things overruled by the said Supreme Court of Nebraska on June 9, 1944 (R. 16).

### **Jurisdiction**

The Supreme Court of Nebraska is the court of last resort in all cases civil or criminal prosecuted under the laws of Nebraska, and is the highest court of said State in which a decision of this cause could be had; that it is constituted the court of last resort and the highest of civil and criminal jurisdiction in a cause of this nature (Habeas Corpus) by the provisions of Article 5, Section 2, of the Constitution of the State of Nebraska, wherein it provides that:

“The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the

state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

And the judgment of the Supreme Court of Nebraska upon overruling petitioner's motion for rehearing is final and conclusive unless it be reversed by the Supreme Court of the United States.

The judgment of the Supreme Court of Nebraska is a final judgment within the purview of section 344 (b) Title 28 U. S. C. A. (section 237 (b) of the Judicial Code, amended), reading as follows:

"Or where any title, right, privilege or immunity is especially set up or claimed by either party under the constitution \* \* \* and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied \* \* \*"

And paragraph 5(a) Rule 38, of the Rules of the Supreme Court, wherein it provides that:

"Where a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

The claim of constitutional rights was also specifically raised by the petitioner, and considered by the Supreme Court of Nebraska, in the form of an assignment of errors appearing in your petitioner's brief submitted for showing. At no time during the entire proceedings in the courts of Nebraska has the respondent made a single denial of the federal contention raised by your petitioner (R. 1-10). The Supreme Court of Nebraska in its opinion after its judgment and order of affirmance of the judgment and order of the District Court of Lancaster of Lancaster

County, Nebraska, dismissing and denying the petition ex parte, held that; I quote in substance:

"Petitioner's plea of guilty stood as a jurisdictional bar to his collateral attack on a judgment of conviction rendered in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States" (R. 14-15).

### Questions Presented

1. Does a plea of guilty to an information of a county attorney charging an alleged offense of which the court has no jurisdiction of, stand as a jurisdictional bar, preventing your petitioner from setting up as here a collateral attack on a judgment of conviction entered in express violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered this question in the negative. Compare, *Smith v. O'Grady*, 312 U. S. 329; *Ex parte kuwitzky*, 135 Neb. 466, 282 N. W. 396.

2. Did petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprive him of his liberty without due process of law, when petitioner, an ignorant Indian, a ward of the Federal Government, failed to demand the assistance of counsel and trial by jury before being tried and convicted, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that this the Supreme Court of the United States has answered that question in the negative. Compare, *Johnson v. Zerbst*, 304 U. S. 458. See also, Chap. 29-1803 C. S. Neb. 1929; *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007.

3. Does a plea of guilty stand as a jurisdictional bar, to a collateral attack on a judgment of conviction which deprived petitioner of his liberty without due process of law, service of a copy of the accusation (information or indictment) and twenty-four (24) hours to examine said charge, consult with counsel and prepare a defense, before being placed on trial and convicted, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered that question in the negative. Compare, *Ex parte Henry Hawk*, 321 U. S. 114, and the authorities there cited. See also, *Zink v. State*, 34 Neb. 37, 51 N. W. 294-5.

4. Did the District Court of Thurston County, Nebraska, have jurisdiction to accept a plea of guilty and pronounce judgment of conviction for an offense allegedly committed on an Indian Reservation in the City of Winnebago, Nebraska? It is respectfully submitted that the Supreme Court of the United States answered that question in the negative. Compare, *Jerome v. United States*, 318 U. S. 101. See also, Title 18 U. S. C. Section 451.

5. Did petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprive him of his liberty without due process of law, and the right to a flat or definite sentence rather than an indeterminate sentence, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States? It is respectfully submitted that the Supreme Court of the United States answered that question in the affirmative. Compare, *Graham v. Weeks*, 138 U. S. --. See also, 33 C. J. p. 1064; *State ex rel. Lang v. Civil Court*

of *Milwaukee County*, 280 N. W. at p. 349. See also, Chap. 29-2620 C. S. Neb. 1929.

### **Reasons Relied Upon for the Allowance of the Petition for Writ of Certiorari**

1. The order, judgment and opinion of the Supreme Court of Nebraska (R. 10-16) in the case at bar involves an important question of federal protected rights secured and guaranteed by the Fourteenth Amendment of the Constitution of the United States which that court failed to protect, and showed a flagrant disrespect for this Courts mandates.

The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony, the penalty was imprisonment not exceeding ten (10) years, due process of law did not absolutely require that the trial court have jurisdiction of the place and subject matter within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, in that a plea of guilty stood as a jurisdictional bar to a collateral attack as in the case at bar. Such a holding is in direct conflict with the decisions of this court, particularly the case of *Jerome v. United States*, 318 U. S. 101, and is in conflict with the procedural guaranteed by the Fourteenth Amendment of the Constitution of the United States.

2. The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony, the penalty was imprisonment not exceeding ten (10) years, due process of law within the meaning of the Fourteenth Amendment of the Constitution of the United States did not absolutely require that the accused be represented by counsel, in that a plea of guilty stood as a jurisdictional bar to thereafter attack the jurisdiction of the trial court to pronounce judgment.



ment of conviction. Such a holding is in direct conflict with the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, and the decisions of this Court, particularly the case of *Smith v. O'Grady*, 312 U. S. 329, and the authorities there cited; See also *Ex parte Henry Hawk*, 321 U. S. 114.

3. The Supreme Court of Nebraska held that in a trial for the commission of a non-capital felony the penalty was imprisonment not exceeding ten (10) years, due process of law did not absolutely require that the accused be served with a copy of the accusation (information or indictment) and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense, within the meaning of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. Such a holding is in direct conflict with the decisions of this Court, particularly the case of *Ex parte Henry Hawk*, 321 U. S. 114, and the authorities there cited. See also *Zink v. State*, 134 Neb. 137, 51 N. W. 294.

4. The Supreme Court of Nebraska held that due process of law did not absolutely require that the accused be sentenced to a flat sentence as required by the laws of Nebraska, within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States. Such a holding is in direct conflict with the decisions of this Court, particularly the cases of *Hans Nielsen, Petitioner*, 131 U. S. 176; *Smith v. O'Grady*, 312 U. S. 329, and Chapter 29-2620 C. S. Neb. 1929.

5. A plea of guilty in and of itself is not a waiver to thereafter collateral attack a judgment of conviction pronounced by a state court in violation of the procedural

guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, this court has very recently condemned the Supreme Court of Nebraska for this practice (*Smith v. O'Grady*, supra). Such a holding has been condemned by every court in the land, even the Supreme Court of Nebraska, unless said members of the said court have a personal bias and prejudice against the Petitioner: Compare, *Ex parte Kuwitzky*, 135 Neb. 466, 282 N. W. 396; *Ex parte Resler*, 115 Neb. 335, 212 N. W. 765; *In re Betts*, 36 Neb. 285, 54 N. W. 524; *In re Havelik*, 45 Neb. 747, 64 N. W. 234. See also, *Smith v. O'Grady*, 312 U. S. 329; *Boyd v. O'Grady*, 121 Fed. (2d) 146; *Dyhre v. Hudspeth*, 106 Fed. (2d) 286. Cf. *Darling v. Fenton*, 120 Neb. 829, 235 N. W. 582; *Rice v. Olson*, 13 Nebraska Supreme Court Journal 227, herewith submitted marked Exhibit "A".

Protection against such a flagrant violation of federal protected life and liberty is certainly "of the very essence of a scheme of ordered liberty" calling for this Court invocation of supervision, as in the case of *Smith v. O'Grady*, 312 U. S. 329; *Ex parte Henry Hawk*, 321 U. S. 114; *Ralko v. Connecticut*, 302 U. S. 319, 325; *Chambers v. Florida*, 309 U. S. 227; *Bryant v. Zimmerman*, 278 U. S. 63.

In support of the foregoing grounds for the issuance of the writ, your petitioner submits the accompanying brief showing more fully the precise facts and arguments applicable thereto.

Wherefore, your petitioner respectfully prays that this Honorable Court issue a writ of certiorari to review the order, judgment and opinion of the Supreme Court of Nebraska, that its judgment be reversed, and that the prayer for a petition for writ of habeas corpus be sustained.

(S.) RICHARD RICE,  
in persona.



STATE OF NEBRASKA,

*Lancaster County, ss:*

Personally before me, the undersigned officer authorized by law to administer oaths, appeared Richard Rice, who being first duly sworn, deposes on oath and says that he has read the foregoing petition for writ of certiorari, that he knows the contents thereof, that the statements therein made are true, except as to such matters as are stated upon information and belief, and these he verily believes to be true, to the best of his knowledge, information and belief.

(S.) RICHARD RICE,

Subscribed in my presence and sworn to before me, this 10 day of August, 1944. L. M. Larsen, Notary Public in and for Lancaster County, Nebraska. My commission expires November 19, 1949. (Seal.)

## **BRIEF IN SUPPORT OF PETITION**

### **Opinion Below**

There was no reported opinion of the District Court of Lancaster County, Nebraska, the order and judgment of dismissal is to be found (R. 8). The order, judgment and opinion of the Supreme Court of Nebraska is reported (R. 10, 11, 16) 13 N. S. C. J. 227, Exhibit "A"), 14 N. W. (2d) 850.

### **Jurisdiction**

The judgment of the Supreme Court of Nebraska sought to be reviewed was entered on April 7, 1944. Jurisdiction to issue the writ requested is found in the provisions of section 344(b) Title 28 U. S. C. A. (section 237 of the Judicial Code, amended); And paragraph 5(a) Rule 38, of the Supreme Court of the United States effective February 27, 1939, and are set out in the petition.

### **A Summary Statement of the Case Will Be Found in the Petition**

A summary statement of the case will be found in the petition and there will be no attempt in this argument to burden the learned court with a reiteration thereof.

### **Specification of Errors**

Petitioner contends that the Supreme Court of Nebraska erred:

1. In holding that petitioner's plea of guilty was a waiver of his constitutional rights to attack the jurisdiction of the District Court of Thurston County, Nebraska, by the process of habeas corpus.

2. In holding that where the accused was tried for a non-capital felony over which the trial court had no jurisdiction

on an Indian reservation, without the assistance of counsel and trial by jury, his plea of guilty stood as a jurisdictional bar to put up the claim in a habeas corpus proceedings that his trial, conviction and commitment to the Nebraska State Penitentiary for not less than 1 nor more than 7 years, deprived him of his liberty without due process of law in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, when he was ignorant of his legal rights and legal skill, petitioner was not entitled to be released upon his petition for writ of habeas corpus.

3. In not holding that petitioner's judgment of sentence deprived him of his liberty without due process of law a necessary requisite to jurisdiction, in that he was sentenced to an indeterminate sentence rather than a flat or definite sentence as required by law in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, and not releasing petitioner upon his petition for writ of habeas corpus.

4. In holding that the judgment and order of the District Court of Lancaster County, Nebraska, dismissing and denying the petition for writ of habeas corpus sought by petitioner was right.

5. In not reversing the judgment of the District Court of Lancaster County, Nebraska, and releasing petitioner on his writ of habeas corpus.

6. In not holding that petitioner's trial, conviction and commitment originally entered by the District Court of Thurston County, Nebraska, was unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Con-

stitution of the United States, and not releasing petitioner on his petition for writ of habeas corpus.

7. In holding that petitioner's plea of guilty constituted a waiver of his constitutional rights to be served with a copy of the accusation within the meaning of the due process secured and guaranteed by the Fourteenth Amendment of the Constitution of the United States, and not releasing petitioner upon his petition for writ of habeas corpus.

### **Argument**

#### **I**

**Upon the Unimpeachable and Disputed Evidence of Facts. Petitioner's Trial, Conviction and Commitment Entered by the District Court of Thurston County, Nebraska, Deprived Him of His Liberty without Due Process of Law, in that Said Trial, Conviction and Commitment Were Unconstitutional and Void, in that Said Trial, Conviction and Commitment Were Obtained by Ordeal and Mobocracy, in Violation of the Procedural Guaranties Protected Against State Invasion Through the Fourteenth Amendment of the Constitution of the United States.**

The Fourteenth Amendment of the Constitution of the United States declares that:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, . . . without due process of law; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS**" (Capitals supplied).

Whatever might have been the law in the State of Nebraska prior to the following decisions it was by those decisions established that "jurisdiction of the place and subject matter was a necessary requisite to due process of law" within the meaning of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, *supra*. Compare, *Jerome v. United States*, 118 U. S. 101; *Miller v. McLaughlin*, 118 Neb. 174, 224 N. W. 18; 281, U. S. 261.

"Service of the accusation and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense and trial by jury are a necessary requisite to due process of law, within the meaning of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States," *supra*. Compare, *Ex parte Henry Hawk*, 321 U. S. 114; *Smith v. O'Grady*, 312 U. S. 329; see also *Zink v. State*, 34 Neb. 37, 51 N. W. 294.

The issue of whether petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska (R. 4-5), deprived him of his liberty without due process of law, is therefore presented under the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*. And upon the facts of the instant case it must be held, it is submitted that his trial, conviction and commitment aforesaid, deprived him of his liberty without due process of law secured and guaranteed by the by the Fourteenth Amendment of the Constitution of the United States, *supra*.

The defendant-petitioner a Ward of the Federal Government an Indian by birth of the Winnebago Tribe of Nebraska, ignorant of the science of law and his legal rights, 31 years of age, was arraigned in the trial court, *supra*, and through his ignorance entered a plea of guilty to an information of an unscrupulous Public Prosecutor charging

the offense of breaking and entering a certain Church building located on the Winnebago Indian Reservation of Nebraska, over which Reservation (lands) he had no jurisdiction to inform of offenses committed thereon (R. 3).

Thereafter on October 14, 1940, your petitioner was arraigned in the trial court and through his ignorance and without the advice of counsel pleaded "Guilty" to the charge laid in the information referred to above, and forthwith the Trial Court read Section 28-538 C. S. Neb. 1929, informing your petitioner what penalty could be imposed on plea of guilty, and asked defendant-petitioner if he had anything to say why judgment should not be passed upon him, the defendant-petitioner replied that he had nothing to say, the court thereupon passed judgment (R. 4).

In his petition for writ of habeas corpus, petitioner, contended, showed and alleged, that:

Among other things, "that his Trial, Conviction and Commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the guarantee contained in the Fourteenth Amendment of the Constitution of the United States" (R. 7).

And:

"(a) In that no jurisdiction rested in the Trial Court to take cognizance of the offense alleged in the information or the person of the accused, in that the alleged crime was committed on an Indian Reservation Government property without and beyond the jurisdiction of the Trial Court" citing auth.

"(b) In that the Trial Court failed to complete the Court before placing your Petitioner upon his defense by an assignment of Counsel; empaneling of a trial jury." citing auth.



"(d) In that he was illegally sentenced to an indeterminate sentence" (R. 7).

The Respondent's Counsel the Learned Walter R. Johnson, Attorney General for Nebraska, filed his reply brief relying solely for an affirmance of the lower courts judgment of dismissing and denying the writ on that petitioner's plea of "GUILTY" constituted a jurisdictional bar to a collateral attack on a judgment of conviction rendered in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*. And the Supreme Court of Nebraska after considering the federal contention raised affirmed the judgment of the district court dismissing and denying the petition in the words and figures as follows to-wit:

"This cause coming on to be heard upon appeal from the district court of Lancaster County, was submitted to the court; upon due consideration whereof, the court finds no error apparent in the record of the proceedings and judgment of said district court. It is, therefore, considered, ordered and adjudged that said judgment of the district court be, and hereby is, affirmed; that appellee recover of and from appellant his costs herein expended, taxed at \$     ; for all of which execution is hereby awarded, and that a mandate issue accordingly. Robert G. Simons Chief Justice" (R. 10).

The Supreme Court of Nebraska in its opinion so flagrantly showed disrespect for this Court's mandate when it said:

"the petitioner is a Winnebago Indian by birth, and a resident of Winnebago, Nebraska, and is a ward of the federal government; that on June 10, 1935, he was tried and convicted in the district court for Thurston county at Pender on an information of the county attorney charging him with the offense of breaking and entering



a building located in Thurston county, and carrying away property of the value of \$35, and was sentenced to a term of one year in the men's reformatory near Lincoln, Nebraska, and served ten months, and was discharged on April 10, 1936."

"This petition then charges that thereafter on May 22, 1940, an information was filed, charging petitioner and one Joe Bigbear with forcibly breaking and entering into a certain dining hall in the village of Winnebago on May 17, 1940, which dining hall is owned by the Winnebago Indian Mission of the Reform Church in America, with the intent to steal property of value contained in said building, and on October 14, 1940, defendant waived preliminary hearing in the county court and was arraigned upon information filed for burglary in the district court and pleaded guilty thereto; \* \* \*."

"It is charged that the trial court did not advise the petitioner of his constitutional rights to have counsel and witnesses, or to be charged and informed against by indictment of a grand jury, which is guaranteed under the Fourteenth, the fifth, and the Sixth Amendments to the Constitution of the United States, nor of his right to a trial by jury, guaranteed by section 6, art. 1 of the Nebraska Constitution, and that said petitioner did not waive those constitutional rights either by action or words, and that such rights cannot be waived by agreement of the parties, and it is charged that he was convicted by a court of incompetent jurisdiction and deprived of his constitutional right of due process of law; that no jurisdiction rested in the trial court, or over the person of the accused, because the alleged crime was committed on an Indian reservation and without and beyond the jurisdiction of the trial court." (Note *in italicized supplied to conform to true facts.*)

"It is also charged that judgment of conviction is unconstitutional and void in that the trial court imposed an indeterminate sentence of from one to seven

years instead of a flat or definite sentence, as by law required, in that petitioner had previously served a sentence in a penal institution at the men's reformatory. See Comp. St. 1929, sec. 29-2620."

"It is further charged in said petition that the petitioner is an Indian of the Winnebago tribe, and the same is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the trial court."

"The petitioner further charges that, after being confined in the Nebraska state penitentiary for 18 months he employed counsel, who advised him that his proper remedy was to file a writ of error *coram nobis* with the trial court, and petitioner's sister paid said counsel \$75 to prepare said petition, which petition was dismissed October 5, 1942."

"It is further charged that under section 29-1803, Comp. St. 1929, it was mandatory upon the district court to assign counsel to guard and enforce rights guaranteed under the Fourteenth Amendment to the United States Constitution."

"It is further charged that he was deprived of his right to be served with a copy of the information and given 24 hours thereafter within which he might examine the charge and prepare a defense."

"Because of these allegations, the petitioner prays that a writ of habeas corpus may issue, directing Neil Olson, Warden of the penitentiary, to bring the petitioner before the court to determine the facts and legality of the petitioner's imprisonment and dispose of the petitioner as law and justice may require, and release him from such false imprisonment, and that he may go hence without day."

"The federal Constitution does provide, in article V of the Amendments, as charged in the petition, that no person shall be held to answer for a crime such as was charged in this case unless upon an indictment of a grand jury, but section 10, art. I of the Constitution of Nebraska provides that the legislature may

provide for holding such persons upon the information of the public prosecutor, and section 26-901, Comp. St. 1929, provides that when a county attorney has sufficient evidence he is authorized to file such proper complaint as was done in this case, in strict accordance with the Nebraska Constitution and laws."

"It is also claimed in the petition that the petitioner is a Winnebago Indian and is under the exclusive jurisdiction of the federal government, and without the jurisdiction of the district court of Nebraska. However, chapter 15, title 18 U. S. C. A., sec. 548, of the federal Penal Code, provides generally that all Indians committing a crime, either within or without an indian reservation within the boundaries of a state, shall be subject to the same laws, and tried in the same courts, and subject to the same penalties as all other persons."

Whereupon, the court disposed of the matter by holding that the "judgment of the trial court was right, and it is hereby affirmed. AFFIRMED." (R. 16)

Upon the following reasons to-wit:

"this court has adopted the rule to be: "The constitutional right of accused to have the assistance of counsel may be waived, and a waiver will be implied where accused, being without counsel, fails to demand that counsel be assigned him." (R. 14).

"A defendant, by pleading guilty, waives all defenses (service of the copy of the accusation and twenty-four (24) hours to examine the charge and prepare a defense) other than that the indictment charges no offense." (R. 14).

The Supreme Court of Nebraska held in substance and in fact in their opinion, that:

"A plea of guilty by petitioner stood as a jurisdictional bar to attack his judgment of conviction entered by

the district court of Thurston County, Nebraska, in violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, supra.' (R. 14-15). See also, *Rice v. Olson*, 13 N. S. C. J. 227.

Such a holding is in direct conflict with the following decisions and the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States. Compare,

*Smith v. O'Grady*, 312 U. S. 329, and the authorities there cited;

*Ex parte M'Clusky*, 40 Fed. Rep. 71; *Boyd v. O'Grady*, 121 Fed. (2d) 146.

See also, *Ex parte Kuwitzky*, 135, Neb. 466, 282 N. W. 396.

See also. *Dyhr v. Hudspeth*, 196 Fed. (2d) 286.

Under all these circumstances it must be held, it is submitted that petitioner's trial, conviction and commitment entered by the District Court of Thurston County, Nebraska, deprived him of his liberty without due process of law, in that they are unconstitutional and void, in that they were obtained by ordeal and mobocracy, in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, supra, and the courts of Nebraska have denied him his constitutional right to be released upon his petition for writ of habeas corpus. This being the case, we have to inquire into the remedy for such a situation and that leads us to our next argument.

## II

**Petitioner Being Remediless in the State Courts of Nebraska, to Extricate Himself from False Imprisonment by the Process of Habeas Corpus from a Judgment of Conviction Entered in Express Violation of the Procedural Guaranties Protected against State Invasion Through the Fourteenth Amendment of the Constitution of the United States, Such Exceptional Circumstances of Peculiar Urgency Exist as to Require the Intervention of This the Supreme Court of the United States, Else He Is Left Remediless.**

The Fourteenth Amendment of the Constitution of the United States declares that:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, \* \* \*, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

### **The Jurisdiction of This Court**

## I

#### **The Judgment Sought to Be Reviewed Is Final in Character**

The order of the Supreme Court of Nebraska entered on April 7, 1944, affirming the judgment below (R. 10), and order overruling Motion for Rehearing (R. 16) finally disposed of all questions presented by the record. *De Bolt v. McBrien*, 96 Neb. 237, 147 N. W. 462. That a judgment of the highest court of a state affirming an order dismissing



a petition for writ of Habeas Corpus is final in character is not debatable. Compare, *Bryant v. Zimmerman*, 278 U. S. 63 (at p. 70), wherein this the Supreme Court of the United States said:

"In the early case of *Holmes v. Jennison*, 14 Pet. 540, 563, 568, 597, this Court held after much consideration that a proceeding in habeas corpus in a state court to obtain release of one held in custody upon a criminal charge, where the detention is alleged to be in violation of the Constitution of the United States, is a 'suit' within the meaning of the jurisdictional statute, and that an order of the state court of last resort refusing to discharge him is a final judgment in that suit and subject to review by this Court. That holding has been respected and given effect in an unbroken line of later decisions, all of which in their material facts and surroundings were like the case now before us. It also has been followed in other cases related in principle."

## II

### **A Substantial Federal Question Was Properly Presented to the Courts Below**

The petition for writ of Habeas Corpus (R. 1-8), and the motion for new trial (R. 8-9) were drawn by a fellow inmate of the Nebraska State Penitentiary. Nevertheless, they were adequate to present the question whether the judgment of conviction entered by the District Court of Thurston County, Nebraska, pursuant to which petitioner is now being detained in the Nebraska State Penitentiary, were unconstitutional and void, as having been entered in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*.

The undisputed facts set forth in the petition were the allegations that:

Petitioner was condemned by a court without jurisdiction of the subject matter on lands reserved to the jurisdiction of the federal courts for prosecution; that he was deprived of his fundamental rights to be served with a copy of the accusation (information) and twenty-four (24) hours to examine the charge, consult with counsel and prepare a defense; that the trial court failed to complete the court by an assignment of counsel and summons of witnesses and empaneling a trial jury; that the judgment of sentence was unconstitutional and void; in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*.

The fact that petitioner based his contentions solely on the Fourteenth Amendment of the Constitution of the United States and presented for the courts of Nebraska's consideration whether a judgment of conviction rendered in express violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*, is such that it is void and may be questioned collaterally. See question presented in petitioner's brief page 4, also brief in support of motion for new trial pages 5, 6, clearly presented a claim of federal protected right. In *Bryant v. Zimmerman*, 278 U. S. 63, Mr. Justice Van Devanter said at page 67:

"No particular form of words or phrase is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intentment that this was done, the claim is to be regarded as having been adequately presented."

Assuming, that by the record a federal question which was substantial in fact were squarely presented, there remains for this Courts consideration, whether under



the decisions rendered in the case at bar by the Supreme Court of Nebraska, if he is remediless, and whether this Court is free, on petition for writ of Habeas Corpus, to consider the facts upon which petitioner's claim that the judgment of conviction deprived him of his liberty without due process of law in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*. Where the writ of Habeas Corpus is invoked in state tribunals, this Court looks to the courts of that state for a definition of the scope of the proceedings. *Henderson v. Lowry*, 301 U. S. 242; compare *Chambers v. Florida*, 309 U. S. 227. See also, *Ex parte Henry Hawk*, 321 U. S. 114 and the authorities there cited and relied upon by petitioner for his release in the State courts of Nebraska.

Thus in *Michaelson v. Beemer*, 72 Neb. 761, 101 N. W. 1007, the court held, in habeas corpus proceedings, that the right to trial by jury could not be waived on agreement of the parties and a judgment of conviction based on a trial to court were absolutely void, and should be set aside (101 N. W. at p. 763).

In *re Resler*, 115 Nebr. 335, 212 N. W. 765, the prisoner sued out a petition for writ of habeas corpus asking an inquiry into the validity as to whether her imprisonment in the county jail constituted double jeopardy in violation of the State Constitution, the Supreme Court of Nebraska on an original application ordered the prisoner discharged in that: "the constitutional rights of the defendant were violated by her second arrest and detention for the same offense contrary to the express terms of the Constitution that no person shall be twice brought in jeopardy for the same offense." citing *Neilsen, Petitioner*, 131 U. S. 176.

To the same effect see *Kuwitzky v. O'Grady*, 135 Neb. 466, 282 N. W. 396, the prisoner was released even though

he *pleaded guilty* and was sentenced by a court without jurisdiction to proceed to judgment of conviction.

On the other hand, in the case of *Darling v. Fenton*, 120 Neb. 829, 225 N. W. 582, the Supreme Court of Nebraska held that on petition for writ of habeas corpus, the court could not inquire into whether the judgment, pursuant to which petitioner was being detained, had been entered as the result of a plea of "guilty" to a charge of murder induced by fear of mob violence.

This case was cited with approval in *Carlsen v. State*, 129 Neb. 84, 261 N. W. 339, wherein the Court said at page 345:

"\* \* \* it should be noted that the writ of habeas corpus does not afford a corrective judicial process to remedy an error of fact at the trial, without which a conviction would not have resulted. **HABEAS CORPUS IS NOT A PROPER REMEDY TO SECURE A RELEASE FROM PRISON OF ONE SENTENCE UPON A PLEA OF GUILTY INDUCED BY FEAR.** *Darling v. Fenton*, 120 Neb. 829."

In the instant case *Rice v. Olson*, 13 Nebraska Supreme Court Journal 227 (herewith submitted, marked Exhibit "A"), at page 229, the court said:

"We have also examined the case of *Smith v. O'Grady*, 312 U. S. 329, 61 S. Ct. 572, and also the memorandum opinion in *Ex parte Williams and Bennett*, decided January 4, 1943, and found in 317 U. S. 604, 63 S. Ct. 431, and find nothing which conflicts with the ruling herein."

And:

"In the case at bar, as the record shows affirmatively that the defendant had pleaded guilty, this absolutely waived this and all other preliminary steps in connection therewith, so this allegation has no merit. \* \* \*"

In a similar case as the one at bar, this Court in *Smith v. O'Grady, supra*, held in substance that:

'Of the contention that petitioner by his plea of guilty forever waived his Constitutional right to attack a judgment of conviction entered in express violation of the procedural guaranties contained in the Fourteenth Amendment of the Constitution of the United States, that contention falls with the premise.' And reversed the Supreme Court of Nebraska, and in no uncertain terms reprimanded the Supreme Court of Nebraska for the flagrant manner in which it had sanctioned a deprivation of life and liberty in violation of the Constitution of the United States.

It is worthy of consideration to point out to the Court at this time, that if the scope of the writ of habeas corpus is so narrow as to preclude consideration of the facts set forth in the record before the Court, then the Nebraska law provides no remedy for the vindication of petitioner's federal protected rights, as the writ of error CORAM NOBIS has been abolished by recent legislation in the State of Nebraska. Compare, 19 Nebraska Law Bulletin 150; See also *Rice v. Olson*, 13 Nebraska Supreme Court Journal 227, 229, at page 228, par. 4. Exhibit "A".

Petitioner having shown that he has been deprived of his liberty in violation of the procedural guaranties protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*, and left remediless, by the state courts of Nebraska, it is incumbent upon this Court to protect his federal protected rights. Compare *Rogers v. Alabama*, 192 U. S. 226, where Mr. Justice Holmes said (at page 230):

"It is a necessary and well settled rule that the exercise of jurisdiction by this court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the right." *Smith v. O'Grady, supra*.

### Conclusion

Equal protection of the laws, and due process of law secured and guaranteed by the guarantee contained in the Fourteenth Amendment of the Constitution of the United States, *supra*, are the pillars upon which our democracy rests. A denial of those rights to the humblest of us is a threat to the liberties of all.

Liberty must be taken only in accordance with those established modes of procedure which have been tried and tested by time. If the experience of our centuries of the common law has demonstrated that trial and conviction in a court of competent jurisdiction, where the defendant has been properly notified and served with a copy of the charge for which he is to answer and is appropriately represented and advised by competent and legal counsel and trial by jury, and to be tried by a court with jurisdiction of the place and subject matter, is better than and preferable to a trial, conviction and commitment obtained by ordeal and mobocracy in violation of the procedural guarantees protected against state invasion through the Fourteenth Amendment of the Constitution of the United States, *supra*, then it is respectfully submitted that the questions raised in the petition for writ of certiorari calls for the exercise by this Court of its supervisory powers to the end that rights guaranteed under the Constitution of the United States and recognized by all civilized nations shall be preserved.

Respectfully submitted,

RICHARD RICE,  
*In Persona.*

